

IN THE COURT OF APPEALS OF TENNESSEE  
WESTERN SECTION AT NASHVILLE

CONTRACTORS HEATING )  
& COOLING, INC., and )  
JAMES T. REDD, )  
 )  
Plaintiffs/Appellees, )  
 )  
VS. )  
 )  
PAUL L. DEVINE, )  
 )  
Defendant/Appellant. )

Davidson Chancery No. 94-841-II

Appeal No. 01A01-9602-CH-00086

**FILED**

November 20, 1996

Cecil W. Crowson  
Appellate Court Clerk

APPEAL FROM THE CHANCERY COURT OF DAVIDSON COUNTY  
AT NASHVILLE, TENNESSEE  
THE HONORABLE ELLEN HOBBS LYLE, CHANCELLOR

TODD E. PANTHER  
TUNE, ENTREKIN & WHITE  
Nashville, Tennessee  
Attorney for Appellant

GAIL P. PIGG  
Nashville, Tennessee  
Attorney for Appellees

**AFFIRMED**

ALAN E. HIGHERS, J.

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

HOLLY KIRBY LILLARD, J.

Plaintiff, James T. Redd, filed suit in the Chancery Court of Davidson County against defendant, Paul L. Devine, seeking to enforce a stock retirement agreement (“SRA”). The trial court held that the SRA was valid and enforceable. The trial court ordered Devine to convey his stock to the company for the price stated in the SRA. Devine has appealed, arguing that the SRA should not be enforced and that the company should be required to pay fair market value for his stock. We find Devine’s contentions to be without merit and, for the reasons stated herein, we affirm the trial court’s judgment.

## I.

The relevant facts are as follows. Contractors Heating & Cooling, Inc. (“company”) was originally formed in 1959, by Carl Parker, Jr., Carl Gardner, and Forest Dillingham, who each owned 30 shares of stock in the company. Shortly thereafter, Redd purchased all of Dillingham’s stock. At all times pertinent herein, Redd served as president, director, and part owner of the company.

In 1972, Devine became an employee of the company. In 1977, Parker, Gardner, and Redd offered Devine a minority ownership interest in the company. Devine purchased 3 shares of stock from each of the three stockholders for a total purchase price of \$45,000.00. At the time of the purchase, all of the stockholders signed a Stock Retirement Agreement. According to Devine, the purpose of the SRA was to prevent Devine from having any control over the affairs of the company. In contrast, Redd asserts that the purpose of the agreement was to prevent the stock from falling into the wrong hands and to ensure that no one else could acquire an ownership interest in the company until the last of the stockholders either retired or died.

The SRA provided that when a stockholder ceased his employment with the company, the company would repurchase his stock. The 1977 agreement provided that the value of the stock would be determined according to “book value.” Specifically, the agreement provided:

In the event of the foregoing circumstances, the Corporation shall pay as a purchase price for each share of stock owned by the permanently disabled or severed Stockholder a sum equal to the book value per share of the Corporation's stock as reflected by financial statements prepared for the last ending fiscal year preceding the purchase of such shares.

In 1980, however, the stockholders executed a new SRA. The 1980 agreement revised the method by which the stock would be valued as follows:

In the event of the foregoing circumstances, the Corporation shall pay as the purchase price for each share of stock owned by the permanently disabled or severed Stockholder the amount agreed upon by all the Stockholders as stated under Section 6 of this Agreement.

Upon the execution of this Agreement and annually, thereafter, or whenever the Stockholders acting unanimously shall determine, **the Stockholders and the Corporation hereby agree that the value per share of the stock owned by Stockholders shall be \$6,200.00 per share. Said value shall, by mutual agreement, be revised upwards or downwards each year** within ninety (90) days following the close of Corporation's fiscal year. **Where no revision as to value is agreed upon by all of the Stockholders**, as evidenced by an addendum to this Agreement, signed by all of the Stockholders, **the last value agreed upon by all of the Stockholders shall be the operable value.** (emphasis added).

Since the execution of the 1980 agreement, the stockholders did not adjust the value of the stock from the stated \$6,200.00 per share price to a figure that reflected the actual value of the stock.

In 1981, the company purchased Parker's 27 shares of stock for approximately \$300,000.00. The same year, Devine became a director and vice-president of the company. In 1986, the company purchased Gardner's 27 shares of stock for \$200,000.00 cash, plus \$75,000.00 for consulting services, \$87,500.00 for his execution of a non-compete agreement, and \$87,500.00 for commissions. These stock redemptions rendered Redd a 75% owner of the company and Devine a 25% owner.

\_\_\_\_\_ From 1981 until 1994, Devine was in charge of the sales and installation of heat and air systems. Sometime in 1993, Devine became dissatisfied with the company. He

began discussing with one of the company's major competitors, A/C Services, the possibility of going to work for them.

On January 17, 1994, Devine submitted his notice of resignation to Redd and offered to sell his stock to the company for \$166,666.68. Redd allegedly told him that the company could not afford to pay that much. Redd asked Devine to reconsider his decision to resign, which Devine agreed to do. Later the same day, however, Devine left Redd a note stating that he intended to resign.

Devine and Redd next met on January 27, 1994. At this meeting, Devine offered to sell his stock for \$45,000.00, plus title to a Jeep Grand Cherokee vehicle. Redd accepted this offer.

Later that day, Devine became suspicious about the rapidity with which Redd accepted his offer. Consequently, he took the company's 1993 financial statement to an accountant for evaluation. As a result, Devine learned that the book value of the company exceeded \$800,000.00. Devine then wrote a letter to Redd rescinding his \$45,000.00 offer.

Although Devine was no longer a stockholder in the company in 1994, the company retained 100% of its 1994 earnings, and allocated 25% of those earnings to Devine, which resulted in tax liability to Devine.

Redd filed a complaint against Devine, alleging that Devine breached the SRA by refusing to sell his stock to the company for \$6,200.00 per share. Redd sought specific performance, plus damages for Devine's alleged breach of fiduciary duty.

In his answer, Devine asserted that his offer to sell his stock for \$45,000.00 was based upon Redd's misrepresentations that the company was in poor financial condition and could not afford to pay more. Devine further asserted that the company was estopped

to rely on the SRA due to the stockholders' failure to revalue the stock. Devine counterclaimed on the basis that the stockholders' failure to revalue the stock and Redd's conveyance of inaccurate information relating to the financial condition of the company constituted breaches of fiduciary duty, and that Redd oppressed Devine by attempting to force him to sell his shares for less than fair market value. Accordingly, Devine sought to compel the company to purchase his stock at fair market value.

Following a non-jury trial, the trial court found that although the fair market value of Devine's stock was \$268,776.00, Devine was required by the SRA to sell his stock to the company for \$6,200.00 per share. Specifically, the trial court held as follows:

1. That the April 1, 1980 Stockholders Retirement Agreement ("SRA") is valid and controls this matter. Application of the provisions of the SRA to the facts of this case establish that the defendant is entitled to receive \$66,666.69 in exchange for his 9 shares of stock in the corporation.
2. The defendant did breach his duty as an officer and director of the corporation by sharing proprietary records of the corporation with the principals of a competing business. The Court determines, however, that the defendant committed this breach of trust negligently and not with any malicious or bad intent to harm the corporation. The Court further determines that the proof failed to establish that any damage resulted to the plaintiff corporation as a result of the breach of trust and, therefore, that no damages are assessed against the defendant for his breach of confidentiality.
3. The plaintiff corporation is required to pay to the defendant \$13,913.00 for tax liability on the grounds that the tax liability pertained to the conduct and relationship of the defendant and the corporation before the defendant left the corporation and, therefore, the past practice of the corporation in funding such tax liabilities as a bonus or otherwise for its directors should be followed. Additionally, the corporation reaped the benefit of that tax treatment.
4. The plaintiff corporation did not act arbitrarily, vexatiously or capriciously regarding the purchase of the defendant's shares of stock and, therefore, liability for the defendant's attorneys fees and costs is not established as to the plaintiff corporation.

Devine has presented several issues for our consideration on appeal. However, we deem these issues to be enveloped by the cardinal question of whether the trial court erred in enforcing the provisions of the SRA with respect to the price of Devine's stock.

## II.

Our standard of review of the trial court's findings in this case is *de novo* upon the record, accompanied by a presumption of correctness, unless the evidence preponderates otherwise. T.R.A.P. 13(d).

Devine first challenges the trial court's finding that the majority shareholders did not breach their fiduciary duties to Devine as a minority shareholder by failing to revalue the stock. According to Devine, a majority stockholder has a duty to revalue stock according to its fair value. We disagree. In doing so, we find the observations of the Rhode Island Supreme Court on this issue to be persuasive. In Estate of Meller v. Adolf Meller Co., 554 A.2d 648 (R.I. 1989), the Court stated:

[T]he value of a shareholder's stock in a closely held corporation is irrelevant when there has been a clear and unambiguous agreement for the redemption of the shareholder's interest...[W]hen an agreement for the redemption of the stock interest has been entered into without fraud, misleading, or overreaching, that agreement will prevail and there is no equitable duty on the part of the other shareholders to revise, update, or change the redemption price in the absence of an agreement to do so.

Id. at 652 (internal citations omitted).

In clear and unambiguous terms, the SRA sets the purchase price for the stock at \$6,200.00. The SRA permits the value of the stock to be readjusted only upon the mutual agreement of the shareholders. Where there is no revaluation agreed upon by all shareholders, the SRA provides that the last value agreed upon shall control. We disagree with Devine that the language of the SRA indicates that the parties' intent was to revalue the stock from time to time. The language of the SRA contains no language evincing such an intent, but instead, specifically provides that the last value agreed upon shall control in the event that no revised value is agreed upon by the shareholders. Devine signed the SRA and agreed to the terms contained therein. It is not the function of this court to rewrite a contract in order to relieve a party from the hardship of an improvident bargain.

In a closely held corporation, the logic behind the enforcement of stock redemption agreements is particularly compelling because a close corporation has a special need to control both the character and the number of shareholders. In addition, a stock redemption agreement allows the business to continue without having to pay out insupportable amounts of money upon the death or retirement of a key shareholder. Estate of Meller, 554 A.2d at 653.

Devine has advanced several other examples of alleged breaches of fiduciary duties justifying nonenforcement of the SRA. Whether a shareholder has breached his fiduciary duty to another shareholder is a question of fact. Thus, the trial court's determinations in this regard are afforded a presumption of correctness. From a review of the record, we do not find that the evidence preponderates against the trial court's finding that there was no breach of fiduciary duty sufficient to merit setting aside the SRA.

Finally, Devine argues that because in actual practice, the company did not follow the dictates of the SRA with respect to Parker and Gardner, the company is equitably estopped from asserting those terms against Devine.

"Estoppel is not favored and it is the burden of the party seeking to invoke the estoppel to prove each and every element of an estoppel." Bokor v. Holder, 722 S.W.2d 676, 680 (Tenn. App. 1986). A party claiming estoppel must prove:

(1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially. Chattem, Inc. v. Provident Life & Acc. Ins. Co., 676 S.W.2d 953, 955 (Tenn. 1984)(quoting Provident Washington Ins. Co. v. Reese, 213 Tenn. 355, 373 S.W.2d 613, 615 (1964)).

Devine's attempt to rely upon equitable estoppel must fail because there is no showing that any inconsistent position taken by the company or its stockholders caused Devine to change his position and suffer detriment in reliance thereon.

Accordingly, we hold that the trial court properly concluded that the SRA was valid

and enforceable. The judgment of the trial court is affirmed in all respects. We find that this is not a proper case for imposition of sanctions for a frivolous appeal. Costs are adjudged against the appellant.

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HIGHERS, J.

CONCUR:

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CRAWFORD, P.J., W.S.

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LILLARD, J.